Cole, Sanford Darley

The Hague rules, 1921.

THE HAGUE RULES 1921 EXPLAINED

BY

SANFORD D. COLE

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Mr. A. Lind Moore

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1921
EXPLAINED

BY

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PREFACE

In view of the wide interest taken by commercial and shipping men and bankers in the proposals to simplify and standardise on an international basis the risks to be assumed by sea carriers under a bill of lading, it is thought that an explanatory summary of the scheme with a short account of the events which led to the preparation of the Hague Rules, 1921, defining the risks referred to, may be of interest. The introductory part of this small book gives the history of the Hague Rules, which are the work of the Maritime Law Committee of the International Law Association, with a condensed explanatory statement of their contents. Following the text of the Rules are some notes dealing with special points, including the question of "Received for Shipment" bills of lading.

S. D. C.

October, 1921.

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INTRODUCTION

1. General Scheme of the Rules.

The Hague Rules, 1921, defining the risks to be assumed by sea carriers under a bill of lading, were framed by the Maritime Law Committee of the International Law Association. After consultation with representatives of the interests concerned from numerous maritime States the Rules were settled during a conference of the Association at the Hague in September, 1921. The conference approved the Rules, and recommended them for international adoption.

Shipowners, shippers, consignees, bankers and underwriters, as well as lawyers, collaborated in the drafting, discussion and settlement of the Hague Rules. Indeed, the Rules are the outcome of a series of developments in which all those interests have been concerned. "There can be no doubt," observed *Lloyd's List* in recording the adoption of the Rules, "that, of late, the sense of dissatisfaction among shippers with the existing state of things has become more marked, and shipowners, while reluctant to abandon their position of freedom to agree terms of contract with individual merchants, have recognised that, as a matter of business, they should meet, as far as possible, the wishes of their customers. The allegation has been that, so far as miscellaneous traffic

carried on liners is concerned, freedom of contract is non-existent or illusory, and that shippers have no option but to accept the conditions, exempting sea carriers from responsibility for loss or damage, prescribed by the forms of bills of lading issued by shipowners. Shippers pressed for the imposition on shipowners of a compulsory obligation to be responsible for the safe carriage of the goods. The demand, though insistent, lacked precision. The intervention of the Maritime Law Committee gave an opportunity for the respective parties to the dispute to become acquainted with the views of the other side. Discussion evolved a clear issue, and it did more. It enabled the parties not only to understand their differences, but, it would seem, to settle them. The Rules provide a definite basis for individual contracts, which has been arrived at, not by compulsion from outside, but by agreement among those directly concerned. Shipowners, cargo owners, bankers and underwriters, representing not one but many nationalities, have met together, and, as a result of their agreement, are now pledged to each other in honour to try and give effect to the scheme which has been worked out."

The general idea, then, of the Hague Rules is to simplify and standardise, in a form suitable for international use, some of the conditions which have hitherto appeared in small print in bills of lading: in other words, to substitute for part of that small print a statement of terms which are fair terms between the parties to the contract of carriage, and can be incorporated in all ordinary bills of lading by a condition simply declaring that "The Hague Rules, 1921" shall apply.

Experience has shown that it is not practicable to draw up a complete uniform bill of lading for all trades—the varieties of circumstances for which provision must be made are too great—but there is no reason why certain features more or less common to all bills of lading should not be standardised. The Hague Rules deal in that way with the responsibilities and liabilities of sea carriers. While they will not supersede all the various conditions commonly appearing in small print, they will take the place of a substantial part of the small print, and, moreover, of a part which has long been matter of controversy between shippers of goods and shipowners.

This, broadly stated, is the scheme of the Rules; but to make their purpose and effect clear we must trace briefly the events in the course of which bills of lading have gradually assumed their present form. A short excursion into commercial history is necessary. Those who are familiar with the story can skip what immediately follows, but it is essential to a full and proper understanding of the matter to recall in outline the origin of the conditions contained in modern bills of lading.

2. Origin of Bill of Lading Conditions.

Originally bills of lading did not contain any conditions at all. These documents came gradually into use as the early custom of merchants or their agents to travel on board the ship with the goods ceased to be followed. When that was the practice particulars of the goods were merely entered in a register carried by the ship, but when

no one accompanied the goods, the necessity arose for a separate document. Therefore bills of lading were introduced. They were issued by the shipowner to the shipper of goods, and were forwarded to the consignee—the person to whom the goods were to be delivered—to be produced by him as evidence of his right to take delivery. The bill of lading was a receipt for the goods issued from the ship, and also a document for transferring the title to the goods to the consignee. To fulfil these purposes more than one copy of the bill was required, and the custom therefore grew up of issuing it in duplicate or triplicate. Moreover, the consignee might resell what he had bought before it arrived, and so the practice of transferring the property in the goods by indorsing the bill of lading became established. Apparently bills of lading were in use before the sixteenth century, and by the eighteenth their indorsement and use as negotiable instruments was well established (Bennett's "History of the Bill of Lading").

In course of time bills of lading came to be worded so as to state the terms of the contract of carriage, and accordingly the present-day bill of lading is defined in Scrutton on Charter-parties and Bills of Lading as "a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship." The bill of lading, though not the contract, is, as the same learned work points out, evidence of the terms of the contract. When indorsed it is the only evidence.

3. Enlargement of the Clauses.

The introduction of the conditions of shipment into bills of lading was a gradual process. What exactly was the liability of the shipowner in the absence of express stipulations in early days is an historical inquiry which we need not pursue here. Whatever it was, steps were taken to qualify it by the insertion of the words "the dangers of the seas excepted" (old form of bill of lading, Abbott, 472). No further exception was introduced till after 1795, when shipowners were alarmed by a legal decision as to the extent of their liability. Failing in an attempt which was made to obtain legislation limiting their liability, shipowners altered the form of the bill of lading by introducing the more comprehensive exception of dangers and accidents of the seas now commonly in use (Abbott, 578; Maclachlan, 605). The number of exceptions has since grown greatly. To meet risks disclosed from time to time by judicial decisions new exceptions have been inserted to protect shipowners from liability.

"It is," observed Mr. H. R. Miller at the Paris conference of the International Law Association in 1912, "because of those decisions that those most extraordinary and most elaborate clauses of exoneration, not only with regard to the liability of the shipowner, but also with regard to deviations, have been inserted. And at first blush, when one reads one of those bills of lading and sees all these extraordinary exceptions, naturally one is up in arms, and says: 'What on earth does it all mean? Is the shipowner going to carry my cargo and have no

liability whatever?' I can assure you, from the shipowner's point of view, that that never was his intention, nor does it, in fact, take place in practice."

Some of the reasons why the clauses were multiplied were very clearly stated at the Hague conference of the International Law Association, 1921, by Sir Norman Hill, who, after referring to the adoption, a good many years ago, of a clause whereby the shipowner freed himself from liability for negligent navigation, pointed out that the shipowner was not content to stop there. "As his business operations widened out" (continued Sir Norman), "he endeavoured, in the bargains he made, to protect himself against liability for the negligence of those employed in the handling, stowage, and care of the cargo. The work had to be done in small part by the crew, who were his servants, but the great bulk of the work had to be entrusted to independent contractors. The loading, stowage, and discharging had to be placed in the hands of independent stevedores, and in many cases the owners of the cargo bargained for the right to name the stevedore to be employed. In other cases the loading or discharging was taken over by the Port Authority or some other undertaking which provided the piers, elevators, or tips at which the cargoes were handled. And as more and more mechanical appliances were employed, checking by the ship's officers of the weights or numbers of the commodities dealt with became more and more difficult.

"And these responsibilities and difficulties increased as the ships grew in size and as their cargoes became more and more varied. Instead of a full cargo shipped by one

merchant and weighed at the ship's rail, a liner was asked to carry thousands and tens of thousands of separate packets shipped by and consigned to hundreds of different interests.

"There were other factors operating to broaden out the scope of the shipowner's operations. As sea transport improved in regularity, safety and certainty, trade sought to turn the shipowners' organisations to the best possible account, and those organisations lent themselves readily not only to the carrying but also to the collection and distribution—and the retail distribution—of the cargoes. Accordingly the bill of lading was extended to cover not only goods actually laden on the ship, but goods handed over to the line to be shipped in the ordinary course of its business, and goods left on the quays after discharge to be distributed amongst purchasers and sub-purchasers. And it went further than this, for it was made to cover through carriage by land and sea, until the ship became only one of the links in the transport services employed. In all these developments the bill of lading became more and more the document of title upon which trade financed its operations, and the shipowners are, I think, entitled to point with pride to the confidence with which their engagements, as expressed in the bills of lading, have been accepted by the bankers. It was all sound and healthy development of business enterprise, well calculated to cheapen transport and distribution, but it was accompanied by risks. It necessitated the shipowner acting as a shipping agent, as a wharfinger, and even as a warehousekeeper, and as a distributing and forwarding agent, and in all of these

capacities he had to entrust the greater part of the work to independent contractors. . . .

"These developments in the oversea trade" (Sir Norman Hill pointed out), "could have been provided for in either of two ways:

> "First. The shipowner could make himself responsible to carry and to deliver the goods in safety, answering for all loss or damage which might happen to them while they were in his possession, or
>
> "Second. The shipowner could offer his services to the merchant on the understanding that he (the shipowner) would use all due diligence in carrying and delivering the goods, but would assume no financial responsibility if the goods were lost or damaged.

"If the shipowner had accepted the first of these positions he would have had to base his freights in part on the value of the goods carried, as the insurance he gave would be part of the working expenses of his business.

"By adopting the second course the shipowner could continue to fix his freights with regard to the weight or bulk of the goods carried and without reference to their value, leaving the merchant free to insure himself against loss, or to run that risk uninsured as he pleased.

"The second course was" (Sir Norman Hill added) "the one adopted, and by strengthening the negligence clauses the shipowner has aimed at relieving himself from all financial responsibility resulting from loss or damage sustained during the carriage."

4. Countries allowing Freedom of Contract.

The state of affairs resulting from the policy thus pursued by British shipowners was summarised in the report dated February, 1921, of the Imperial Shipping Committee (a document more particularly referred to later on), as follows: "By the Common Law of England the shipowner is responsible for the safe carriage and delivery of goods committed to his charge as a common carrier, unless prevented by certain definite causes such as the Act of God or the King's enemies; but there is nothing in English law to stop him from contracting out of the whole or any part of his liability, and, by a practice which has gradually extended since about 1880, British shipowners do habitually in their bills of lading contract themselves out of their Common Law liability to a large extent."

The Committee added in their report that, "although shipowners protect themselves in their bills of lading from legal liability, yet the practice among many of them is, in fact, to pay reasonable claims for loss or damage to goods. Such practice is not, however, universal."

In France, Sweden, and Norway the legal position has, it appears, hitherto been very much as in the United Kingdom.

In Germany the largest shipping companies, as the outcome of agreement between them and shippers, adopted before the war a bill of lading which accepted on behalf of the shipowners the carriers' risks.

5. Countries prohibiting Exemption Clauses.

In America freedom of contract as between the parties to a contract for the carriage of goods by sea was narrowed by judicial decisions, and, since the passing of the Act of Congress, commonly known as the Harter Act, in 1893, the insertion by shipowners of clauses exempting them from liability has been prohibited by statute.

The Harter Act, while exempting a shipowner who exercises due diligence to make his ship seaworthy from liability for damage or loss resulting from what may be shortly described as navigation risks, prohibits him from inserting in any bill of lading or shipping document any clause relieving him from liability for what may be termed carriers' risks—that is, from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise. The Act applies to ships transporting merchandise from or between ports of the United States and ports in other countries, and, consequently, its provisions must be incorporated in all bills of lading issued in the United States by a clause declaring the shipment subject to the provisions of the Act. It thus necessarily becomes part of the contract which any shipowner, of whatever nationality, may make for the carriage of goods from United States ports.

In Australia, New Zealand, and Canada, Acts have been passed resembling the Harter Act in their general features. The most recent of these is the Canadian Water Carriage of Goods Act, 1910, amended by a further Act in 1911.

The Australian Sea Carriage of Goods Act was passed in 1904, and the New Zealand Shipping and Seamen Act in 1908, an amending statute being passed in 1911. Except that the New Zealand legislation is so worded that it apparently applies only to cases brought before the New Zealand courts, the Australian, New Zealand, and Canadian Acts closely resemble each other.

In Japan, the Commercial Code provides that "the shipowner cannot even by an express agreement be exempted from liability for damage caused by his own fault, or by the bad faith or the gross fault of a mariner or of any other person employed, or by the unseaworthiness of the ship" (Report of Imperial Shipping Committee).

6. Imperial Shipping Committee's Report.

A comparative view thus shows a difference between the laws of the various countries which fall into two contrasting groups. Generally speaking, the law merchant is in its principal outlines uniform in all countries, having for the most part developed from common international mercantile usage. Here, however, is a marked divergence, which has been the subject of much discussion. It is common knowledge that in many countries commercial bodies representative of shippers of goods have agitated for legislation on the question of the limitation of shipowners' liability by clauses in bills of lading whereby the insertion of such stipulations would be uniformly prohibited. British Chambers of Com-

merce have been active in the matter, and proposals for legislation have been brought forward in France, Holland, the Scandinavian countries and elsewhere.

The matter, so far as affecting the British Empire, was inquired into by the Dominions Royal Commission, which, in 1917, made recommendations, but no action followed. The position was reviewed by the Imperial Shipping Committee appointed in June, 1920, to whose report, dated February, 1921, several references have already been made. The recommendations of the Committee were summarised and commented on in a leading article in *Lloyd's List*, from which we quote. "This Committee" (observed the article), "composed of representatives of British State Departments, Dominion Governments, and shipping and commercial interests, has recommended that there should be uniform legislation throughout the Empire prohibiting shipowners from contracting out of carriers' risks (as distinguished from navigation risks) by clauses in bills of lading. The Committee's conclusion includes proposals for certain further provisions in regard to particular points connected with the extent of shipowners' liability which are important in themselves, but, in comparison with the main question, are merely details. The outstanding fact is that the Committee, representing very diverse points of view, is agreed that a Canadian statute dealing with the water carriage of goods, and closely resembling the well-known American Harter Act, should be taken as the model for legislation to be passed in such a form that its application will extend to the whole of the British Commonwealth of Nations. The Committee feels that on commercial

grounds there is probably an advantage to be gained by the proposed change. It is suggested that, though the English law would be fundamentally altered, the change would not, in practice, greatly affect the position of shipowners who while inserting clauses excluding liability, nevertheless pay reasonable claims. Uniformity of law would be a gain, and the discontent which shippers frequently express in regard to shipping conditions would, it is suggested, be removed. The Committee's report touches on points which have, from time to time, been matters of acute discussion between shippers and shipowners, and have a bearing also upon the interests of underwriters. It may be that if steps are taken to give effect to the proposals they will not pass unchallenged. Still, here is the outline of a broad policy, intended to reconcile interests and, as far as possible, eliminate conflicts. It is entitled, at the very least, to careful consideration as a serious effort, based on well-balanced arguments, towards a satisfactory settlement of an old and difficult problem. In various continental countries there is, the report mentions, a considerable body of opinion in favour of legislation along the lines proposed. In view of this fact it may be asked whether the steps to be taken might not be even wider in their scope than the Committee proposes."

After pointing out that the terms of reference limited the proposals of the Imperial Shipping Committee to the British Empire, the article quoted from asked, "Why should not the rules as to shipowners' liability be of world-wide application?" and proceeded: "The Maritime Law Committee of the International Law

Association is at present examining the whole law of affreightment, which includes, or should include, provisions as to the form of bills of lading. Co-operation on the widest possible basis would seem to be desirable if the matter is to be dealt with satisfactorily."

This suggestion that the Maritime Law Committee should deal with the question anticipated the action which in fact followed; but, before referring to that, mention should be made of a circumstance which has made the whole question of responsibility for goods in transit a more urgent problem than formerly, and has had a great deal to do with the amount of attention devoted to the legal aspect of it.

7. Pilferage.

One of the greatest difficulties which since the war have troubled business men has been how to check the enormous increase in theft and pilferage from goods in transit. Shipowners estimate that the evil is twenty times as great as before the war. Shipping companies have had to pay immense sums to meet claims for lost goods. Underwriters have (as mentioned in the report of the Imperial Shipping Committee) refused to cover more than seventy-five per cent. of the losses due to pilferage, with the object of making shippers more careful in packing, and shipowners more diligent in supervising their servants. The root of the evil is widespread individual dishonesty, and this increase in dishonesty is one of the bad results of the war. Whatever moralists

may say, commercial men in all countries have had to consider the consequences seriously, and endeavour to find practical remedies. Circumstances have thus forced upon their attention the question of the clauses in bills of lading limiting shipowners' liability, and, on taking up the matter, the Maritime Law Committee found that it was a problem in which business men of all nationalities were keenly interested. Thus progress with the scheme for an international settlement of the long-standing difference between shippers and shipowners has been rapid.

8. The Maritime Law Committee.

At the time when the Report of the Imperial Shipping Committee was published the Maritime Law Committee of the International Law Association had already under consideration the draft of an international code on the law of affreightment dealing mainly with charter parties and only incidentally with bills of lading. When, however, the Maritime Law Committee met in conference, under the presidency of Sir Henry Duke, at Gray's Inn, on May 17th to 20th, 1921, to consider this and other subjects, it appeared desirable that attention should be devoted mainly to those aspects of bills of lading which were dealt with in the Report of the Imperial Shipping Committee. The subject of charter parties was therefore postponed, and the Maritime Law Committee proceeded to consider the conditions under which goods are carried by sea under bills of lading, bearing in mind that a law-

fully issued bill of lading binds a ship whether issued on behalf of the owner or the charterer.

At this conference it was urged on behalf of shipowners that the permanent interests of both parties to the contract and of the whole community are best served by maintenance of the mutual right to make their bargains without legislative interference, but it was stated that shipowners were desirous of rendering all the services which owners of cargo in fact require, and a plain statement was invited of the matters in respect of which compulsory regulations were called for.

Shippers were stated to be in general agreement with the proposals set forth in the Report of the Imperial Shipping Committee. They advocated the adoption of international regulations whereby shipowners should be answerable in all cases for loss and damage due to unseaworthiness of the ship, inclusive of any harmful or improper condition of the ship's hold, and for default in lading, custody, and care, and unlading of goods; and should be exempt from liability in respect of perils of the sea and of navigation (including perils due to negligent navigation, act of God, and the King's enemies), insufficient packing and seizure under legal process. Bills of lading drawn in conformity with the Water Carriage of Goods Act, 1910, of the Dominion of Canada, would, it was stated, provide all necessary safeguards to cargo owners.

The views of the majority of the Committee (according to the report officially issued) were expressed in favour of a uniform system of law among maritime States whereby liability for losses caused by defect of ship or

default in the handling and custory of goods should be obligatory upon the shipowner, provided that—in the words of Section 6 of the Canadian statute—"if the owner . . . exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship or from latent defect."

The Committee, after discussing the whole matter in detail, came to the conclusion that it would be simple to incorporate in a common form bill of lading by words of reference the terms of an international code in the same way as the terms of individual statutes or of agreed rules have already been incorporated.

In order to be in a situation to deal with this matter at the full Conference of the Association to be held at the Hague in September, 1921, the Committee decided to take steps to obtain the embodiment in a draft code of regulations of such provisions as would in their view give international effect to the main intentions of the Harter Act and the Dominion statutes.

9. The Hague Conference.

The code of Rules afterwards adopted under the name of "The Hague Rules, 1921," was drafted by a sub-committee and circulated among those concerned for criticism. Much valuable work was done in adjusting the clauses to meet the expressions of opinion received, and

eventually the proposals were discussed at length and finally settled at the Hague. At that conference of the International Law Association all the interests concerned were represented by delegates of many nationalities, and a series of resolutions was adopted as follows:

Resolutions as recommended by the Maritime Law Committee and passed unanimously by the International Law Association in their meeting at the Hague on the 3rd day of September, 1921.

1. That in the opinion of this Association international overseas trade and commerce will be promoted and disputes avoided, or the settlement thereof facilitated, if the rights and liabilities of cargo owners and shipowners respectively are defined at an early date by Rules of a fair and equitable character with regard to bills of lading which shall be of general application.

2. That the Association approves, under the name of "The Hague Rules, 1921," the Rules as to carriage by sea framed by its Maritime Law Committee which have been settled during this conference after consultation with representatives of the interests concerned from numerous maritime States, and recommends the same for international adoption. For the purpose of securing prompt and effective action, the Association relies upon the continuance of the cooperation among shipowners, shippers, consignees, bankers and underwriters present and represented at the conference which appears to render this pro-

posal at the present time a practical means of progress.

3. That in the opinion of the International Law Association these Rules should apply to ships owned or chartered by any Government other than ships exclusively employed in naval or military service.

4. That these Rules be published in English and French, the official languages of this conference.

5. That in the opinion of this Association the use of the shipping documents known as "received for shipment" bills of lading and like documents has become in many cases a necessity of commerce. This Association is therefore of opinion that the interests concerned should co-operate to remove difficulties which at present attend the use of such documents in the cases in which the necessity for their use is generally recognised.

6. Whereas special legislation on the subject dealt with by these Rules exists in various States and is proposed in other States, and whereas it will only be possible in such States to bring these Rules into operation if they be in accord with national legislation, it is in the opinion of this Association desirable in order to secure uniformity that such legislation or proposed legislation shall be brought into harmony with these Rules.

7. That the Executive of the Maritime Law Committee be and is hereby authorised and requested to continue its action, in conjunction with the repre-

sentative bodies and interests concerned, in order to secure the adoption of the said Rules so as to make the same effective in relation to all transactions originating after January 31st, 1922.

In connection with these resolutions it should be noted, before passing on to summarise the Rules themselves, that the possible method of uniform legislation in each country was definitely put aside in favour of the alternative of an international code of rules worked out after full discussion and representing terms of agreement as to sea carriers' risks between all parties. In taking this course the members of the International Law Association were following precedent. The York-Antwerp Rules of General Average, which were the outcome of earlier conferences of the Association, are already commonly incorporated by reference in bills of lading, and the intention is that the Hague Rules should similarly form part of the terms of all ordinary contracts for the carriage of goods by sea expressed in bills of lading. If, as appears probable, the Rules thus come to form part of the everyday machinery of business, the steps taken in arriving at agreement may rightly be described, in the words of Sir Henry Duke, as "more involved in the future of the world than schemes of greater ambition that are being discussed."

10. Explanatory Summary of the Rules.

As already remarked, a shipowner has, by English law, the liabilities of a common carrier. In the absence of express stipulations a shipowner carries goods absolutely at his risk. In modern practice there always are express stipulations, and, under an ordinary bill of lading, the contract is "(1) to carry absolutely at shipowner's risk; (2) unless the damage is caused by excepted perils; (3) provided the shipowner and his agents have used reasonable care to prevent such damage" (Scrutton, 228).

The Harter Act and the similar legislation already referred to restrict freedom of contract upon the assumption that there exists, apart from the legislation, a basis of liability.

The Hague Rules, while intended to give effect to the main provisions of this legislation, do not assume or depend upon the pre-existence of liabilities. The Rules themselves set out the responsibilities and liabilities to which a sea carrier is to be subject, and the rights and immunities to which he is to be entitled. In view of their intended international application it is important that they do not assume a basis of liability which may be different under different national laws. The Rules are self-contained and complete in themselves.

The Hague Rules define the risks to be assumed by sea carriers under a bill of lading in a series of Articles, the first of which, containing definitions, need not detain us here, except to note that "goods" does not include live animals and cargo carried on deck.

It should also be noted at the commencement that the

scope of the Rules does not by any means extend to all the various matters dealt with by conditions in bills of lading. The Rules are concerned with sea carriers' risks only, and do not interfere with freedom of contract as to liability for loss or damage in connection with the custody or handling of goods prior to loading on or subsequent to unloading from the ship (Article VI.). "Carriage of goods" covers the period from the time when the goods are received on the ship's tackle to the time when they are unloaded from the ship's tackle.

Risks.—Article II. provides that (subject to the right given by Article V. to make a special agreement in relation to any particular goods, as explained later) under every bill of lading or similar document relating to the carriage of goods by sea, the carrier, in regard to the handling, loading, stowage, carriage, custody, care, and unloading of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities set forth in the Rules.

Responsibilities and Liabilities are dealt with in Article III. The carrier, it is provided, is bound to exercise due diligence to make the ship seaworthy, properly man, equip, and supply the ship, and make the holds and other parts of the ship in which goods are carried fit for them.

By Clause 2 of this Article "The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried." This, it will be noticed, throws the responsibility for the goods absolutely on the carrier, subject to the provisions of Article IV. below.

After receiving the goods, the carrier is required by

the Rules to issue on demand a bill of lading showing (*a*) leading identification marks; (*b*) the number, quantity or weight of packages; and (*c*) the apparent order and condition of the goods. Except as to bulk cargoes and timber the bill of lading is made *primâ facie* evidence of the receipt by the carrier of the goods as therein described,* and the shipper is held responsible for the accuracy of the particulars furnished by him.

Removal of the goods at the port of discharge is declared to be *primâ facie* evidence of delivery of the goods as described in the bill of lading unless written notice of a claim for loss or damage is given before removal. This, it should be observed, deals only with the question of evidence, and does not mean that if goods are removed without notice of claim, no claim can afterwards, in any circumstances, be made. It merely establishes a presumption of due delivery, which may be disposed of by sufficient evidence. Only if no action is brought within twelve months after delivery do the Rules declare the carrier discharged from liability.

As to the form of bill of lading to be issued, it is laid down that, after the goods are loaded, this shall, if required, be a "shipped" bill of lading. A "received for shipment" bill of lading, if previously issued, may be exchanged, when the goods have been loaded, for a "shipped" bill of lading, or may be converted into a "shipped" bill by being noted with the name of the ship and the date of shipment.

* By French law a bill of lading is conclusive evidence against the shipowner of the receipt of the goods mentioned in it. See Elder, Dempster *v.* Dunn (1909), 15 Com. Cas., 49.

The Rules themselves do not contain any other provision dealing with "received for shipment" bills of lading, though the difficulties which arise from the use of this form of shipping document were very fully gone into in the course of debate at the Hague conference. A resolution (which is No. 5 among those set out above) was adopted regarding "received for shipment" bills of lading. The whole matter is dealt with in a note appended to the full text of the Rules later on. (See p. 47.)

Finally, Article III. provides that any clause or agreement relieving the carrier from liability for the obligations under which he is placed by the Article, or lessening such liability otherwise than as provided in the Rules, shall be null and void and of no effect.

Rights and Immunities are the subject of Article IV., the first clause of which gives exemption from liability for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied.

The next clause gives exemption from liability for loss or damage arising or resulting from negligent navigation, perils of the sea, and a number of other causes specified under seventeen heads, similar in general to the excepted perils in the ordinary bill of lading.

The excepted perils have, however, as Scrutton observes, varied with each trade and each shipowner. Exceptions, the same author remarks, "are so numerous that an exhaustive enumeration is impossible"; but he gives a list of about fifty different exceptions which have come before the courts for judicial interpretation.

The position, if the Hague Rules are incorporated in a bill of lading, will be that the fixed list of exceptions contained in the Rules (which leave the shipowner's liability for ordinary carriers' risks intact) will govern the contract, and cannot be added to. The concluding clause of Article III. (noted above) renders of no effect any clause lessening the carrier's liability otherwise than as provided in the Rules.

It will of course be open to the parties, as already mentioned, to make a special agreement under Article V., but this must, by the provisions of that Article, be a non-negotiable document marked as such. It cannot be a bill of lading if the bill is made subject to the Hague Rules.

Apart from the fact that the gradual strengthening of clauses against cargo owners of which they have complained will cease if they adhere to the practice of contracting on the basis of the Rules, the circumstance that exceptions will be standardised will be a convenience especially to bankers, who have to handle large numbers of bills of lading every day for security purposes. As was pointed out at the Hague conference by Mr. W. W. Paine, representing the British Bankers' Association, it is not at present safe to pass a bill of lading without reading it through from beginning to end, for it is often the case that most material clauses and exceptions may be hidden away among a number of innocent-looking clauses. In future, if a bill of lading incorporates the Hague Rules, that fact in itself will make it unnecessary to look for or be on guard against anything further so far as sea carriers' risks are concerned.

As to deviation, this Article, by its third clause, permits any deviation with the object of saving life, or any deviation authorised by the contract of carriage, and provides that the carrier shall not be liable for loss or damage resulting from such deviation.

It is implied in any contract of sea carriage that there shall be no unnecessary deviation. Deviation to save life is regarded as allowable; but, in the absence of special stipulation, deviation with the object of saving property is not. A clause permitting deviation is commonly inserted in bills of lading.

It will be seen that the Rules do not introduce any innovation in this respect. Deviation with the object of saving life is permitted in any case, and the bill of lading may contain a clause allowing deviation for such other purposes as may be specified. Then, if loss or damage results from a permitted deviation the carrier will not be liable.

The maximum amount of liability, dealt with in the fourth clause of this Article, was a matter which was the subject of lengthy debate. Various proposals were discussed before the limit of £100 per package or unit was agreed to. The clause referred to lays down that there shall be no liability beyond this amount (or the equivalent in other currency) unless the nature and value of the goods have been declared and inserted in the bill of lading. It also lays down—and this is of great importance—that a higher, but not a lower, figure may be substituted by agreement.

It is not necessary here to refer to alternative proposals which were not adopted, but it may be pointed out that,

under the Hague Rules, a loophole existing in the Harter Act and similar legislation (with the exception probably of the Canadian Act) will be closed. The Rules in effect embody a suggested amendment of the Harter Act which has been the subject of discussion in American shipping circles. The object of this amendment would be to negative decisions of the American courts that, notwithstanding the provision in the Harter Act declaring it illegal for shipowners to contract out of liability, it is nevertheless lawful for the parties to agree upon a value for the goods, by which means shipowners effectively limit their liability for losses to cargo. Under the Hague Rules a reduced figure cannot be agreed, as the amount named as a maximum (subject to increase by agreement) is declared also to be a minimum. (See also note, p. 51.)

The remaining clauses of this Article do not call for special comment. There are provisions as to dangerous goods not introducing anything new, and a clause giving the carrier liberty to surrender rights or immunities, provided such surrender is embodied in the bill of lading.* Although the carrier can diminish his immunities, he cannot, as already pointed out, increase them and thereby lessen his liabilities under the Rules.

Special Conditions provided for by Article V. have already been referred to. (See also note, p. 53.)

Application of the Rules.—The scope of the Rules, dealt with in Article VI., was explained at the commencement of this summary.

* This will allow of the insertion of the clause, usual in the timber trade, making the bill of lading conclusive evidence of the quantity of cargo received by the ship.

Limitation of Liability.—By Article VII. the provisions of the Rules are not to affect the rights and obligations of the carrier under the convention relating to the limitation of the liability of owners of sea-going vessels. This refers to a proposed international convention for unifying different national laws on this matter, which, however, has not yet been finally settled.

To sum up: The Hague Rules hold the shipowner responsible for the goods from the time when they are loaded till they are unloaded, but free him from liability for loss or damage resulting from unseaworthiness if he has exercised due diligence to provide a seaworthy ship, properly manned, equipped, and supplied, and they free him from navigation risks. The Rules establish a standard form of terms of contract for the carriage of goods by sea, which has been settled after full discussion by all interests concerned, and is regarded by the great majority of those who have considered the matter as providing a fair and equitable basis. The proposal in the concluding resolution passed at the Hague by the conference of the International Law Association is that the Rules should be adopted so as to make them effective in relation to all transactions originating after January 31st, 1922.

THE HAGUE RULES, 1921

DEFINING THE RISKS TO BE ASSUMED BY SEA CARRIERS UNDER A BILL OF LADING, REFERRED TO IN THE FOREGOING RESOLUTIONS. (*Set out on page* 24.)

Article I.—DEFINITIONS.

IN these Rules

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(*b*) "Contract of carriage" means a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea.

(*c*) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo carried on deck.

(*d*) "Ship" includes any vessel used for the carriage of goods by sea.

(*e*) "Carriage of goods" covers the period from the time when the goods are received on the ship's tackle to the time when they are unloaded from the ship's tackle.

Article II.—Risks.

Subject to the provisions of Article V, under every contract of carriage of goods by sea the carrier, in regard to the handling, loading, stowage, carriage, custody, care and unloading of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities, hereinafter set forth.

Article III.—Responsibilities and Liabilities.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to

(*a*) make the ship seaworthy;
(*b*) properly man, equip and supply the ship;
(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall on the demand of the shipper issue a bill of lading showing amongst other things

(*a*) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as will remain legible until the end of the voyage ;

(*b*) the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper before the loading starts ;

(*c*) the apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to issue a bill of lading showing description, marks, number, quantity, or weight

which he has reasonable ground for suspecting do not accurately represent the goods actually received.

4. Such a bill of lading issued in respect of goods other than goods carried in bulk and whole cargoes of timber shall be *primâ facie* evidence of the receipt by the carrier of the goods as therein described in accordance with section 3 (*a*), (*b*) and (*c*). Upon any claim against the carrier in the case of goods carried in bulk or whole cargoes of timber the claimant shall be bound notwithstanding the bill of lading to prove the number, quantity or weight actually delivered to the carrier.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy of the description, marks, number, quantity and weight as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.

6. Unless written notice of a claim for loss or damage and the general nature of such claim be given in writing to the carrier or his agent at the port of discharge before the removal of the goods, such removal shall be *primâ facie* evidence of the delivery by the carrier of the goods as described in the bill of lading, and in any event the carrier and the

ship shall be discharged from all liability in respect of loss or damage unless suit is brought within 12 months after the delivery of the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that no "received for shipment" bill of lading or other document of title shall have been previously issued in respect of the goods.

In exchange for and upon surrender of a "received for shipment" bill of lading the shipper shall be entitled when the goods have been loaded to receive a "shipped" bill of lading.

A "received for shipment" bill of lading which has subsequently been noted by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment shall for the purpose of these Rules be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the

duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect.

Article IV.—Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship ;

(*b*) fire ;

(*c*) perils, dangers and accidents of the sea or other navigable waters ;

(*d*) act of God ;

(*e*) act of war ;

(*f*) act of public enemies ;

(*g*) arrest or restraint of princes, rulers or people, or seizure under legal process ;

(*h*) quarantine restrictions ;

(*i*) act or omission of the shipper or owner of the goods, his agent or representative ;

(*j*) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general ;

(*k*) riots and civil commotions ;

(*l*) saving or attempting to save life or property at sea ;

(*m*) inherent defect, quality or vice of the goods ;

(*n*) insufficiency of packing ;

(*o*) insufficiency or inadequacy of marks ;

(*p*) latent defects not discoverable by due diligence ;

(*q*) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents, servants or employees of the carrier.

3. Any deviation in saving or attempting to save life or property at sea or any deviation authorised by the contract of carriage shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

4. Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods in an amount beyond £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before the goods are shipped and have been inserted in the bill of lading.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

The declaration by the shipper as to the nature and value of any goods declared shall be *primâ facie* evidence, but shall not be binding or conclusive on the carrier.

5. Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been wilfully misstated by the shipper.

6. Goods of an inflammable or explosive nature or of a dangerous nature, unless the nature and character thereof have been declared in writing by the shipper to the carrier before shipment and the carrier,

master or agent of the carrier has consented to their shipment, may at any time before delivery be destroyed or rendered innocuous by the carrier without compensation to the shipper, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such consent shall become a danger to the ship or cargo they may in like manner be destroyed or rendered innocuous by the carrier without compensation to the shipper.

7. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities under this Article, provided such surrender shall be embodied in the bill of lading issued to the shipper.

Article V.—Special Conditions.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, or the care or diligence of his

servants or agents in regard to the handling, loading, stowing, custody, care and unloading of the goods carried by sea, provided that in this case no bill of lading shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Article VI.—LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the unloading from the ship on which the goods are carried by sea.

Article VII.—LIMITATION OF LIABILITY.

The provisions of these Rules shall not affect the rights and obligations of the carrier under the convention relating to the limitation of the liability of owners of sea-going vessels.

NOTES ON SPECIAL POINTS

1. Seaworthiness.

As already pointed out, the Hague Rules differ from existing legislation in America and some of the British Dominions in being a self-contained code capable of application in any country without reference to national law. The Rules are not, like that legislation, dependent on a basis of liability laid down by general law in any country. Nevertheless, they give effect to the main provisions of the American Harter Act and Dominion statutes, and in this connection it is interesting to refer to some observations in the Report of the Imperial Shipping Committee on the shipowner's obligation to provide a seaworthy ship.

At present, as the Report points out, there is legislation in Canada, Australia, and New Zealand, but there is no corresponding legislation in the United Kingdom, India, South Africa, or Newfoundland.

"The chief difference" (the Report continues) "between the Australian Act and the rest of the legislation is the provision of Section 8 (1) to the effect that in every bill of lading there shall be an implied warranty of seaworthiness at the beginning of the voyage, while the other Acts are satisfied by the exercise on the part of the

shipowner of due diligence to see that the ship is seaworthy in every respect, and is properly manned, equipped, and supplied.

"We should perhaps point out that the difference in effect between the exercise of due diligence and the absolute warranty of seaworthiness is that the former makes allowance for defects which could not have been discovered by the exercise of ordinary care, while the latter does not. We think that the former is the more reasonable requirement, since the principle that the shipowner should not be liable for what is not within his control is conceded in the matter of navigation risks.

"We think that the assimilation of the Australian law on this point with that of the rest of the Empire should be part of the uniformity to be effected."

The Hague Rules, it will be noticed, adopt the basis of uniformity favoured by the Imperial Shipping Committee, inasmuch as they do not require from the shipowner an absolute warranty of seaworthiness, but only that he shall, at the beginning of the voyage, exercise due diligence to make the ship seaworthy (Article III., clause 1), and the Rules free the shipowner from liability for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied (Article IV., clause 1).

2. "Received for Shipment" Bills of Lading.*

The Hague Rules do not deal with "received for shipment" bills of lading except by providing that, after goods have been loaded, a document of that kind may be exchanged for a "shipped" bill of lading, or may be converted into a "shipped" bill by being noted with the name of the ship and the date of shipment. The result of the discussion at the Hague of which the Rules are the outcome was that no provision affecting the legal relationship between parties to "received for shipment" bills of lading was inserted in the Rules themselves. Debate served to call attention to business difficulties arising in connection with this class of shipping document, but these difficulties, it was felt, are matters calling for separate and distinct treatment, and, accordingly, all that was done at the Hague was to refer, in one of the resolutions adopted, to the desirability of co-operation among the interests concerned with a view to some solution being arrived at.

It is recognised that "received for shipment" bills of lading are in many cases a necessity of commerce. They are in general use not only in connection with cotton shipments, but in other branches of the trade from America, where the special difficulties recently discussed do not ordinarily arise. They are in use also in the Australian trade, but the action of banks in declining to treat these documents as bills of lading has resulted, it was

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stated at the Hague, in "shipped" bills of lading being issued in Australia to enable shippers to make their financial arrangements, although in fact the goods have not been shipped. This is clearly a most undesirable practice, but acceptance of the alternative form of document involves banks in possible liabilities of a serious kind. After explaining the difficulties with which banks are faced, Mr. W. W. Paine, one of the representatives of the British Bankers' Association at the Hague conference, suggested that, if exporters and importers would confer with the bankers, matters might be placed on a more satisfactory footing. In the circumstances, it may be useful to give an explanation of one or two of the principal legal points involved.

The "Marlborough Hill" Case.—It has perhaps been rather hastily assumed, since a decision given by the Privy Council in the case of the *Marlborough Hill* (1921), 1 A.C. 444; V. Lloyd's List Law Reports, 362, that a "received for shipment" bill of lading is legally a bill of lading for all purposes, but it is doubtful whether this is so. In a more recent case, Diamond Alkali Export Corporation *v.* Bourgeois (VIII. Lloyd's List Law Reports, 282), Mr. Justice McCardie, in delivering judgment on July 1st, said with reference to the Privy Council judgment, "I wish to point out first that the actual decision in that case was merely that the bill of lading there in question (which closely resembles the one now before me) fell within Section 6 of the Admiralty Court Act, 1861. It may be that the phrase 'bill of lading' in that section permits of a broad interpretation. I point out next that there is no express statement in the *Marlborough Hill*

that the document there in question actually fell within the Bills of Lading Act, 1855."

Under the last-mentioned Act, it may be explained, the indorsee of a bill of lading has the rights of the original shipper, and, by the Act of 1861, also referred to, the endorsement of a bill of lading may give to the indorsee a right of action in Admiralty against the carrying ship.

In the *Marlborough Hill* case the judgment, which was delivered by Lord Phillimore, dealing with the contention that shipping instruments in the "received for shipment" form are not bills of lading within the Act of 1855, and therefore not within the Act of 1861, said: "Their Lordships are not disposed to take so narrow a view of a commercial document." There can, the judgment pointed out, be no difference in principle between acknowledging receipt of the goods on the wharf, quay, or storehouse awaiting shipment, and acknowledging that the goods have actually been put over the ship's rail. Moreover, the liberty to tranship is well established, and, if the contract begin when the goods are received on the wharf, the substitution of another ship does not, the Privy Council considered, differ in principle from transhipment. The actual decision, however, was merely that the "received for shipment" bill of lading was a bill of lading within the Act of 1861.

Mr. Justice McCardie's Decision.—In the case heard by Mr. Justice McCardie the question was whether tender of a "received for shipment" bill of lading was sufficient under a c.i.f. contract of sale, shipment being from America to Sweden, and terms of payment being cash

against documents under confirmed banker's credit at London. He decided that it was not sufficient, after very fully reviewing all the authorities, including the *Marlborough Hill* case. While diffident in discussing that decision, Mr. Justice McCardie pointed out that legally it was not binding on him, and expressed the view that there was a great difference, both from a legal and business point of view, between receiving for shipment and receiving on board ship. Moreover, he considered that substitution and the right of transhipment are distinct things, and rest on different principles. The passage in which these points were discussed by the Privy Council would, he thought, have no application at all to a c.i.f. contract which provides for a definite date of shipment. He held, accordingly, that the *Marlborough Hill* case did not apply to a c.i.f. contract such as that before him, and that, though the document before him was a "shipping document" within the American Harter Act, it was not a bill of lading within the c.i.f. contract between the parties in the case he had to decide.

There is, therefore, some conflict of judicial opinion. It may well be, as Mr. Justice McCardie observed, that his decision that the buyer was entitled to reject the documents on the ground that no proper bill of lading was tendered by the sellers in conformity with the c.i.f. contract, will be disturbing to business men. He considered, however, that the phrase "bill of lading" as used with respect to a c.i.f. contract, means a bill of lading in the sense established by a long line of legal decisions, and that, unless this meaning be given, the matter is thrown into confusion. The judge added, however, that possibly

legislation is needed to enlarge the operation of the Act of 1855, though he thought that the difficulties indicated in his judgment could be met by the insertion of appropriate clauses in c.i.f. contracts.

This brings us back to the remarks made by Mr. Paine at the Hague. "Received for shipment" bills of lading are well established in the American trade under conditions which meet some of the bankers' difficulties. In the Eastern trade they have been issued by shipowners under pressure from consignors, but if consignors and consignees agree in giving bankers instructions to recognise these documents, and if difficulties like those arising in connection with date of shipment can be provided for, satisfactory arrangements which will meet trading requirements can probably be made.

3. Maximum and Minimum Liability.

Reference was made in the Introduction to the terms of clause 4 of Article IV. of the Rules providing that there shall be no liability beyond £100 per package or unit unless the nature and value of the goods have been declared and inserted in the bill of lading, and that a higher but not a lower figure may be substituted by agreement, the last-mentioned provision (making £100 a minimum as well as a maximum) being designed to prevent evasion of liability by agreed under-valuation of goods.

This point was referred to in the Report of the Imperial Shipping Committee, which quoted Section 8 of

the Canadian Water Carriage of Goods Act, 1910, as follows:

> "The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a higher value is stated in the bill of lading or other shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding or conclusive on the ship, her owner, charterer, master or agent."

The Report then observed:

"It is noticeable that the limit of one hundred dollars imposed by the Act is low compared with the limit voluntarily imposed by the shipowners in other trades. The Act, apparently, leaves it open to the shipowner to charge a higher freight for packages of which the declared value is over one hundred dollars.

"Neither of the other similar Dominion Acts nor the Harter Act contains any provision of this kind, and although the Harter Act purports to render it illegal for shipowners to contract out of their liability for loss of, or damage to, goods, nevertheless, the United States Courts have held that it was competent for a carrier of goods to agree with the shipper upon the valuation of the property carried, so that the carrier assumes liability

only to the extent of the agreed valuation. The view has been expressed to us that, in effect, shipowners could evade their liability under any of the existing legislation except, perhaps, the Canadian Act, by 'agreeing' an extremely low value for goods with the shipper."

This is the loophole mentioned in the Introduction, which the Hague Rules close.

4. Exceptional Risks.

The liberty granted by Article V. of the Rules to agree to special conditions in regard to any particular goods is safeguarded, as already pointed out, by the requirement that any special agreement lessening the carrier's liability as fixed by the Rules shall be embodied in a receipt, which shall be a non-negotiable instrument and shall be marked as such. If made subject to the Rules such an agreement cannot be in the form of a negotiable bill of lading.

The importance of some provision being made for exceptional cases, in which goods should be allowed to be carried by shipowners at owner's risk, was emphasised in the Report of the Imperial Shipping Committee, and a method of making provision was outlined in their Report, but the Hague Rules deal with this point much more simply, and, it would seem, effectively, than would be the case if the plan proposed in the Committee's Report was adopted.

"It was suggested to us in evidence" (said the Imperial Shipping Committee) "that had refrigerated carriage not been well established in the trades affected at

the dates of the passing of the Harter Act and of the similar Dominion Acts, their provisions might have prevented the initiation or development of that method of sea-transport, as the shipowner would have refused to bear the unknown risk. It was urged that in any new legislation provision should be made for the transfer of liability to the trader in respect of similar developments in the future. We were impressed by this argument and shall refer to it again later."

In passing, it may be observed that the fact that the Committee contemplated legislation, whereas the Rules represent international agreement, is immaterial in connection with the question how provision for exceptional risks could best be made.

Later in their Report the Committee observed: "We believe that such exceptional cases are likely to be very few, but we think it important that the new legislation should contain provisions for defining what articles, voyages, or methods of carriage ought to be excepted from its operation on the ground that the risks attached to the carriage or voyage are so new or uncertain that it is inexpedient that the Act should apply; and further that, inasmuch as such risks will in most cases be likely to become ordinary risks as the trade in question develops, there should be power to remove such exceptions."

To secure elasticity as to new and exceptional articles, voyages, and methods of carriage, and as to the curtailment of liability in exceptional circumstances, the Committee suggested that provision should be made for references to an Imperial Investigation Board.

That suggestion, however, is open to the criticism that

to give effect to it would involve increase of officialism, and, moreover, would be to set up a method whereby decisions would rest with persons other than those actually concerned. The Committee's proposals lack the automatic quality of the provision in the Hague Rules, which leaves the parties themselves free to settle their own affairs, and at the same time ensures that the shipping documents, if containing special conditions lessening the carrier's liability, shall (1) not be in the form of bills of lading at all, or (2) if in that form shall be special bills not incorporating the Rules, which are intended to form part of all ordinary bills of lading.

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